Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DENISE PANGBURN,

Petitioner,

versus

NORTHERN KENTUCKY UNIVERSITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was it error to grant Summary Judgment to Respondent when it failed to provide effective accommodations regarding a learning disability under the ADA, Section 504 of the Rehabilitation Act, and Kentucky Civil Rights Act?

II. Was it error to grant Summary Judgment to Respondent when the law clearly indicates that effective and reasonable accommodations is an issue of fact to be decided by a jury?

III. Was it error for the lower courts not to follow the directive of the civil rights on the "effectiveness" of the accommodations to be provided?

IV. Was it error for the trial court and appellate court to defer to the school in deciding the very issue before it on the effectiveness of the accommodations it provided to the student by the same school?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW vi

JURISDICTION vi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED vii

STATEMENT OF THE CASE 1

REASON FOR GRANTING THE WRIT

The decisions in this case affects almost 10% of all full-time college students who enter college each year, and is most significant to all disabled students in the United States--not only those in college, but high school, grade school, and pre-school 9

CONCLUSION 23

APPENDIX

Appendix A
District Court Opinion and Order, 12/30/98 ..... 1a

Appendix B
District Court Order, 3/9/99 ..... 8a

Appendix C
Sixth Circuit Order Affirming District Court's Grant of Summary Judgment, 3/23/00. . . . . .11a

Appendix D
Sixth Circuit Order, 4/11/00 . . . . . 17a

Appendix E
Directive of the Office for Civil Rights 19a

Appendix F
Table 1 from *1999 College Freshman with Disabilities, Statistical Year 1998*, by Cathy Henderson (American Council on Education) . . 31a

TABLE OF AUTHORITIES

Cases

Board of Curators of Univ. of Missouri v. Horowitz,
435 U.S. 78 (1978) 17

Brown v. Board of Education of Topeka (Brown I),
347 U.S. 483 (1955) 17,18

Brown v. Board of Education of Topeka (Brown II),
349 U.S. 294 (1955) 18

Denise Pangburn v. Northern Kentucky University,
1998 WL 1595522 (E.D.Ky. 1998) ..... *vi*

Denise Pangburn v. Northern Kentucky University,
210 F.3d 372, Unpublished Disposition,
2000 WL 331948 (6th Cir. 2000) vi

Doherty v. Southern College of Optometry,
862 F.2d 570 (6th Cir. 1988) 11,17

Haywood v. National Basketball Association,
401 U.S. 1204 (1971) 20

Regents of Univ. of Michigan v. Ewing,
474 U.S. 214 (1985) 17

Santa Fe Independent School District v. Doe,
2000 WL 775587 (U.S. 2000) 19

School Bd. Of Nassau County v. Arline,
480 U.S. 273, 287-88, n. 17 (1987) 12

United States v. Microsoft Corporation,
97 F.Supp.2d 59,
2000 WL 726757 (D.D.C. 2000) 21

Statutes

U.S. Const., Amendment XIV, Section 1 vii
28 U.S.C. Section 2101(c) vi
28 U.S.C. § 1254(1) vi
28 U.S.C. § 2106 vi
42 U.S.C. Section 794 . . . . . .vii,1,2,12
42 U.S.C. Section 12101 . . . . . viii,9
42 U.S.C. Section 12131 . . . . . x,2
34 C.F.R. Section 104.4 . . . . . .x,14
34 C.F.R. Section 104.43 xiii
34 C.F.R. Section 104.44 . . . . . xiv,13

Other Authorities

Office for Civil Rights, *Auxiliary Aids And Services For Postsecondary Students With Disabilities: Higher Education's Obligations Under Section 504 And The ADA* (Revised October 1996) . . . . . 15,App. E

OPINIONS BELOW

The Opinion and Order of the District Court for the Eastern District of Kentucky in *Denise Pangburn v. Northern Kentucky University*, 1998 WL 1595522 (E.D.Ky. 1998), is set forth in the Appendix hereto. (App. A).

The Order of the District Court in overruling motion to set aside the summary judgment granted to respondent. (App. B).

The Opinion of the United States Court of Appeals for the Sixth Circuit in *Denise Pangburn v. Northern Kentucky University*, 210 F.3d 372, Unpublished Disposition, 2000 WL 331948 (6th Cir. 2000), is set forth in the Appendix hereto. (App. C).

The Order of the United States Court of Appeals for the Sixth Circuit in overruling petition for rehearing in the failure to provide effective accommodations. (App. D).

BASIS FOR JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on March 23, 2000. Petitioner filed a Petition for Rehearing which the United States Court of Appeals denied on April 11, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. 28 U.S.C. Section 2101(c).

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nondiscrimination under Federal Grants and Programs 42 U.S.C. Section 794

(a) No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

. . .

For the purposes of this section, the term "program or activity" means all of the operations of--

. . .

(b)(2)(A) a college, university, or other postsecondary institution, or a public system of higher education . . .

Equal Opportunity for Individuals with Disabilities
42 U.S.C. Section 12101 (ADA)

§ 12101. Findings and purpose

(a) Findings

The Congress finds that--
(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;
(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Definitions—42 U.S.C. Section 12131

(2) The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communications, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance—34 C.F.R. Section 104.4

§ 104.4 Discrimination prohibited.

(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.
(b) Discriminatory actions prohibited.
(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;
(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;
(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;
(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or
(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.
(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.
(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that

are not separate or different.
(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.
(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.
(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.
(c) Programs limited by Federal law. The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons

is not prohibited by this part.

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance—34 C.F.R. Section 104.43

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance—34 C.F.R. Section 104.44

(a) Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) Other rules. A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) Course examinations. In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting

the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) Auxiliary aids.

(1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

STATEMENT OF THE CASE

This is a case of first impression on the issue of the effectiveness of accommodation required under ADA and Section 504 of the Rehabilitation Act. Petitioner, Denise Pangburn, is a 29-year-old woman who is prevented by a single letter grade for Math 141 at Northern Kentucky University ("NKU") ("C" versus "D") from being certified to teach kindergarten to fourth grade (K-4) as a teacher. NKU states that she must have a "C". The state standards are a passing grade, which she has secured with her "D". This is the only grade she needs to graduate and be certified as a teacher. Without a "C" in this one class, she can not be certified to teach. Pangburn has almost a "B" average in all her other classes. Denise has a learning disability that prevents her from passing this math class with a "C" without effective accommodations. The Respondent is NKU, a publically funded university within the meaning of 42 U.S.C. § 794.

This is an action arising out of Northern Kentucky University's failure to effectively accommodate petitioner, Denise Pangburn's ("Pangburn") geometry (math) learning disability, which is required under the American with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., § 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794 et seq., and K.R.S. 344.020 et seq. NKU was required to provide her with adequate and effective accommodations, which it did not.

After NKU failed to comply with the law and provide adequate and effective accommodations, she filed a complaint in federal court on October 20, 1997. The district court granted Summary Judgment to Northern Kentucky University on December 30, 1998. Thereafter, Ms. Pangburn asked the court to alter, modify, or vacate the Summary Judgment Order on January 11, 1999 which was denied on March 9, 1999.

Petitioner filed a timely appeal with the Court of

Appeals for the Sixth District on April 6, 1999. On March 23, 2000, the Court of Appeals affirmed the District Court's judgment. Petitioner filed a petition for rehearing on April 5, 2000, which was denied on April 11, 2000.

It was undisputed and assumed for the purpose of summary judgment and the appeals that Pangburn is disabled under the ADA, Rehabilitation Act, and the Kentucky Civil Rights Act. The issue appealed was whether Pangburn was provided reasonable and effective accommodations that would make her "otherwise qualified" under those statutes. The appellate court deferred to the districts court which deferred to NKU holding that Math 141 was a necessary requirement of NKU's elementary education program, and getting a "C" in the class was an additional requirement. It cited inadequate case law to support its notion that deference must always be given to educational institutions on such issues, nor did it give consideration to the fact that the amount of deference

to be given to a public university could be a material issue of fact. The District Court and the Court of Appeals for the Sixth Circuit both ruled for NKU because they felt like they must give deference to the educational institute on such issues.

Turning to the issues of reasonable and effective accommodation, the appellate court continued to blatantly ignore Petitioner's facts. Petitioner believes that the lower courts overlooked or misapprehended the issue of the "effectiveness" of the accommodations provided to Petitioner after Petitioner was diagnosed with a specific geometry learning disability. The only two times that Petitioner took Math 141 after the disability was diagnosed on August 20, 1994 and confirmed on March 7, 1995 by NKU, NKU had to provide accommodations (as apposed to the prior times of services). Much has been argued about what NKU provided prior to the diagnoses of Pangburn's condition. All of this is irrelevant to the decisions. The

only thing that matters is what did NKU do after the condition was diagnosed. Do not be fooled, as was the District and Court of Appeals for the Sixth Circuit, by the things that took place prior to the diagnoses of the condition. These were in the summer class of Dr. Smith of 1996, and in a specially designed tutorial class of the Spring of 1997, which Denise described as excellent. Denise demonstrated that if given the proper accommodations, such as oral testing during her tutorial in the spring class of 1997, she can succeed.

The specially designed 1997 class for Denise was the first time that Denise's accommodations were effectively given to her after she qualified for benefits of the law. However, this class was terminated when, as NKU's lawyers stated in oral argument in the Court of Appeals for the Sixth Circuit, the lawyers got involved and demanded that Denise Pangburn sign a full and complete release before the class was completed. Denise should have

been allowed to complete this class without signing a release of all her rights. If they had, Denise probably would not be before the Court at this time as she was passing this class with the desired grade.

The other time, after diagnoses was made, Denise Pangburn took Math 141 was from Professor Smith in the Summer of 1996, and received a "D", just a couple of points below the "C" she needed in that course to graduate and be certified to teach.

Pangburn had four (4) tests that semester.

On June 17, 1996, no test proctor was in the room. On July 1st, the test proctor came in to the room in the middle of the test and distracted Denise. On July 9th and July 25th tests, Kim Murphy was the test proctor, and she was a lady who suffered from her own disability of sleep apnea, and slept and snored during the test. During the Summer class of 1996, Marlene Jones, Denise's friend, was allowed to remain in the room with her, but was <u>not</u>

permitted to read the test to her.

The very purpose of a test proctor is to read the exam to the student and answer general questions without giving answers to the questions themselves. At no time was a "real" test proctor provided by NKU during this class for any of the four (4) tests.

Sleeping and snoring during two (2) of the four (4) tests is reason alone for a person not to pass.

All the experts for both Petitioner and Respondent agreed that the test proctors should have been allowed to read the questions, without giving the answers to the questions, in order to be an effective accommodation, that the room should be quiet and distraction free, that snoring by a test proctor during the exam is not distraction free, and that a proctor coming in the middle of the test is a distraction. Denise went to Dr. Smith, her math Professor in 1996, and requested she be given the opportunity to take the final exam over orally, to which he replied, "No."

The Courts have ignored the facts because the courts chose to defer to schools on educational issues.

NKU did provide accommodations for the Summer class of 1996, but these accommodations were not effective as required by law as is obvious by the facts. At the very least, the effectiveness of the accommodations is an issue of fact that should have been tried by a jury, and summary judgment should not have been granted.

REASONS FOR GRANTING THE WRIT.

The decisions in this case affects almost 10% of all full-time college students who enter college each year, and is most significant to all disabled students in the United States--not only those in college, but high school, grade school, and pre-school.

A recent study by the American Council on Education indicates that among the 1.6 million first time, full-time freshmen enrolled at 3,100 institutions of higher education in the United States in 1998 indicates that some 154,520, or 9.4 percent, had some kind of disability (See App. F).

This case significantly effects probably more people than any case heard by the Supreme Court. If effects every child in pre-school, grade school, high school, and college that has a disability--the sum of which totals in the millions.

This is a case of first impression on the issue presented, and the Supreme Court is the proper court to set the law for the United States of America. The purpose of the ADA in 42 U.S.C. §12101(b)(3) specifically states that

it is the purpose of this chapter "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities . . ."

NKU's entire case revolves around the argument that they just have to provide accommodations. Who cares about how effective they are?

This Court should adopt the review of the Office of Civil Rights on the effectiveness of accommodations being the law, and not just providing accommodations, without regard to their effectiveness. (See App. E).

The lower courts' decisions have effectively eroded away section 504 of the Rehabilitation Act and the ADA, and have eliminated the protection afforded by it for the almost 10% of the students pursuing a higher education in the United States by deferring such decisions to the educational institutes, and refusing to order effective accommodations.

The petitioner, Denise Pangburn, is among that 10 percent of disabled freshmen college students. The appellate court's decision of March 23, 2000 affirmed the district court's opinion and mandate for Summary Judgment in favor of the appellant, and deemed, as a matter of law, that the court must defer to the University's opinion on the issue of reasonable accommodation under section 504's definitional analysis of "otherwise qualified" (See App. C).

First, this decision goes against previous case law stated in the case of *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988). The court held at page 575 as follows:

> The question after [petitioner] is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the 'otherwise qualified' inquiry, our precedent requires that the 'reasonable accommodation' question be decided as an issue of fact--meaning, of course, that is one for the trial court or jury, subject to 'clearly erroneous'. . .

review only. See also *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 287-88, n. 17, 107 S.Ct. 1123, 1130-31, 94 L.Ed.2d 307 (1987).

NKU has argued, and the courts have accepted, that all it has to provide is accommodations period--nothing more..

Second, and most importantly, the issue of "effectiveness" as required by Section 504 of the Rehabilitation Act (29 U.S.C. Section 794) has never been ruled on by any higher court in the United States--it is an issue of great importance which will affect every disabled student across this great nation.

Regardless of how "reasonable" accommodations (including services and auxiliary aids) may appear to be, if these accommodations are not or could not be effective for a particular student or for a particular handicap, then these accommodations will never be fruitful or productive. Not all students with similar handicaps benefit equally from the same accommodations. For example, what good does it do to provide a hearing impaired student tape recorded lessons

if the student could not hear them. Although the accommodations would be reasonable for some students, it certainly would not be effective for the hearing impaired student. The issue of "effectiveness" is referenced to in numerous locations throughout Section 504. Auxiliary aids (accommodations) are specifically mentioned in 34 C.F.R. § 104.44(d)(2):

> (2) Auxiliary aids may include taped texts, interpreters or other **effective** methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. [Emphasis Added].

There is *no* mention by Congress of "reasonable" accommodations. Each accommodation should be specifically designed to accommodate and be adapted for use by specific students' needs. Other such general provisions throughout Section 504 indicate the need for "effectiveness":

> (b) Discriminatory actions prohibited.
> (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
> . . .
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as **effective** as that provided to others;
> (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped person unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as **effective** as those provided to others . . .
> 34 C.F.R. § 104.4 (b)(1)(iii) - (iv). [Emphasis Added].

Section 504 goes on to further state:

> (2) For purposes of this part, aids, benefits, and services, to be **equally effective**, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs. 34 C.F.R. § 104.4 (b)(2). [Emphasis Added].

As the article *Auxiliary Aids And Services For Postsecondary Students With Disabilities: Higher*

Education's Obligations Under Section 504 And The ADA, by the U.S. Department of Education, Office for Civil Rights, Washington, D.C., revised October 1996, indicates:

> The institution must analyze the appropriateness of an aid or service in its specific context. . . . Public institution also should be aware that under Title II of the ADA, in determining what type of auxiliary aid and service is necessary, the institution must give primary consideration to the requests of individuals with disabilities. (See App. C).

It is clear that for the four (4) tests of the Summer class of 1996 that the accommodations were not effective, i.e. no test proctor on one (1), two (2) classes that the proctors snored through, and one where they would not let the friend read the questions to Denise. These facts are not disputed. These were not and are not effective accommodations. NKU should not have been granted summary judgment on these facts.

Clearly NKU did not meet the Office of Civil Rights directive on "effectiveness" in the accommodations which NKU provided to petitioner for this one (1) class and

the (4) tests.

Without ever ruling on the issue of effectiveness, the District Court and the Court of Appeals for the Sixth Circuit erroneously ruled as a matter of law that accommodations provided were reasonable without looking at the actual effectiveness of the accommodations. They deferred to NKU on this issue, and for all practical purposes, NKU made the decision in the case because the courts would not interfere with an educational decision by a school.

The Court of Appeals for the Sixth Circuit indicated that the courts should "defer to academic institutions when evaluating school curricula or other academic decisions in disability discrimination cases." (See App. C). The District Court did the same thing in its opinion--the court is both unwilling and unable to substitute its judgment for that of NKU. (See App. A).

NKU, nor should any educational institute, be the

sole judge of whether they complied with the law on effective accommodations. This unjust "deference rule" that has been carved out for educational institutions can be traced through the *Doherty* case only as far back as 1978. This can be seen on page 576 of *Doherty*, 862 F.2d 570:

> [W]e note that this case arises in an academic context where judicial intervention in any form should be undertaken only with the greatest reluctance. See, e.g., *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 514, 88 L.Ed.2d 523 (1985) (declaring federal courts unsuited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions"). The federal judiciary is ill equipped to evaluate the proper emphasis and content of a school's curriculum. *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 89-91, 98 S.Ct. 948, 954-56, 55 L.Ed.2d 124 (1978).

The statement that ". . . federal judiciary is ill equipped to evaluate the proper emphasis and content of a school's curriculum . . ." should not be used to grant authority to defer to NKU on the issue of effectiveness of its accommodations. In *Brown v. Board of Education of*

Topeka (Brown I), 347 U.S. 483, 74 S.Ct. 686 (1955), this court held:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. **Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.** [Emphasis Add]. *Brown I*, 347 U.S. at 494, 74 S.Ct. at 692.

Brown v. Board of Education of Topeka (Brown II), 349 U.S. 294, 75 S.Ct 753 (1955), stated that it is the federal courts duty and obligation to step in and order the law to be followed when the school system refuses or fails to do so. If this court had deferred to the school system on the issue

of segregation, segregation would still be the law today because the school system thought separate but equal was correct and permissable.

In a very recent case decided by this High Court, *Santa Fe Independent School District v. Doe*, 2000 WL 775587 (U.S. 2000), this court found that the Santa Fe Independent School District was violating the Establishment Clause because the student-led, student-initiated invocations prior to the football game were "authorized by a government policy and take place on government property at government-sponsored school-related events." *Santa Fe Independent School District*, 2000 WL 7755887. This Court recognized and reaffirmed one of the fundamental duties of the federal court system to step in on educational institutions to ensure that the laws, statutes, and Constitutional protections of the American government are being carried out. Petitioner asks for the same justice to be done for the millions of students with

disabilities.

By allowing the courts to defer to the educational institutes on the issue of "effectiveness" places it on a level above the protection guaranteed to private corporations.

In *Haywood v. National Basketball Association*, 401 U.S. 1204, 91 S.Ct. 672 (1971), this court found it necessary to intervene in the affairs of the National Basketball Association ("NBA") to insure that justice would be carried out. *Haywood*, 401 U.S. at 1206, 91 S.Ct. At 674. Here one finds that the federal courts did not defer to the NBA's decision, but intervened in the NBA's affairs to allow justice for one individual, and the very small number of persons capable of playing in the NBA. It follows suit that the federal courts have the ability and duty to intervene in the affairs of educational institutions for the sake of millions of individuals to be granted an opportunity at an equal education.

Casey Martin is but one of two disabled golfers who

want to ride in golf carts to play golf in the PGA. Yet, the PGA wants to be in the same category as the schools, defer to it on the rules of the PGA, and not have the ADA apply to it or the courts to interfere with its rules.

In the very recent *United States v. Microsoft Corporation*, 97 F.Supp.2d 59, 2000 WL 726757 (D.D.C. 2000), the District Court ruled that the leading manufacturing mogul and virtuoso of personal computer operating systems, applications, and Internet web browsers concluded that it must intervene into the affairs of this privately owned corporation to conduct modifications and structural reorganizations. Should Microsoft be given a special status and be exempt from the law because they are the computer genius giant? It would have this status if it was a school system.

The Bar Associations will be asking to defer to them on their Bar Exams or to provide additional time for the test.

The Medical Testing Boards will be asking not to interfere with their exams, and not to require them to provide effective accommodations.

Should the Bar Association and Medical Testing Board be given the same deferment status as schools? The list is endless. The logic is clear though--there is no reason why schools should continue to have this preferred status. The court should intervene and enforce effective accommodations as needed and provided for by law.

The Petitioner, in her struggle, echoes the words of one of our most famous founding fathers, Abraham Lincoln: "The probability that we may fail in the struggle ought not to deter us from the support of a cause we believe to be just." Congress found it necessary to specifically state that reasonable accommodations *must be* effective to allow those with disabilities to be treated equally so that they may continue to struggle for what they believe is just--an equal education.

CONCLUSION

The lower courts should not have deferred to NKU on the issues of the effectiveness of the accommodations.

NKU failed to provide effective accommodations for the one time Pangburn took the Math 141 after her learning disability was diagnosed, and did not comply with Office of Civil Rights directive.

NKU should not have been granted summary judgment when it is clear that the one time Pangburn took the class after the math learning disability was diagnosed that the accommodations provided were not effective.

Pangburn should have been granted summary judgment on this issue as the facts clearly show this one class that she took after her learning disability was diagnosed the accommodations afforded her were not effective. At the very least, the case should be remanded for a jury trial on the issue of facts presented.

The court should take this case because it is

Pangburn's last chance to be a school teacher, and because the accommodations provided for her must be effective for her to get a "C" in this math class.

This case involves an issue that affects every disabled student. It is critical for each of these students to be provided with effective accommodations. This High Court should hear this case because the outcome of which will affect numerous disabled students nationwide.

For all the reasons identified herein, a writ of certiorari should issue to review the decisions of the United States Court of Appeals for the Sixth Circuit. This case should be remanded to the District Court for a trial on the merits of the effectiveness of the accommodations provided.

Respectfully submitted,

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and

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CERTIFICATION

I hereby certify that 3 true and correct copies of the foregoing has been mailed this 10th day of July, 2000 to the following:

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

[Filed December 30, 1998.]

CIVIL ACTION NO. 97-178.

DENISE PANGBURN,

Plaintiff - Appellant,

v.

NORTHERN KENTUCKY UNIVERSITY

Defendant- Appellee.

_____/

OPINION AND ORDER

FORESTER, J.

This matter is before the Court upon the motion of defendant Northern Kentucky University ("NKU") for summary judgment. Plaintiff Denise Pangburn failed to file a response to NKU's motion. Pursuant to Local Rule 7.1(c)(1), such failure may be grounds for granting NKU's motion; however, the Court will consider this motion on the merits. [FN1]

FN1. Numerous motions are also before the Court; namely: NKU's motions to disallow Pangburn's expert witnesses [DE # 37], to strike witnesses and exhibits disclosed after the discovery deadline [DE # 52], and to attach an exhibit to its reply to Pangburn's response to NKU's motion to disallow Pangburn's expert witnesses [DE # 53]; and Pangburn's motions to prohibit NKU from calling any expert witness [DE # 41], to prohibit NKU from using records obtained by subpoena duces tecum [DE # 42], to prohibit NKU from using an expert [DE # 46], for leave to depose counsel for NKU [DE # 65], and for summary judgment [DE # 66].

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is a disability discrimination action brought pursuant to § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (the "Rehabilitation Act"); the Americans with Disabilities Act of 1990, 42 U.S.C. § 12182 (the "ADA"); and the Kentucky Civil Rights Act, KRS 344.020 et seq. Pangburn alleges that NKU impermissibly discriminated against her on the basis of a disability. Specifically, Pangburn asserts that NKU failed to reasonably accommodate her math learning disability.

Pangburn was enrolled at NKU as an elementary education major. She intends to teach grades K through 4. In order to obtain an elementary education degree, NKU requires its students to obtain a grade of C or higher in both "Mathematics for Elementary and Middle-Grades Teachers" ("Math 140") and "Mathematics for Elementary and Middle-Grades Teachers II" ("Math 141"). Pangburn obtained the minimum passing grade of C in Math 140 on

her second attempt; however, after completing Math 141 six times, Pangburn never obtained a grade higher than D. After her first four attempts at Math 141, Pangburn was diagnosed with a math learning disability and was given numerous accommodations by NKU. Because she has been unable to obtain a grade of C in Math 141, Pangburn has not received her elementary education degree.

II. NKU'S MOTION FOR SUMMARY JUDGMENT

NKU contends that it is entitled to summary judgment because it provided reasonable accommodations to Pangburn and did not discriminate against her on the basis of her disability. The Court agrees and will grant summary judgment in favor of NKU based upon the following analysis.

A. Summary judgment standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." ' Patton v. Bearden, 8 F.3d 343, 346 (6th Cir.1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. Matsushita

Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." Moore v. Phillip Morris Companies, Inc., 8 F.3d 335, 340 (6th Cir.1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. Id. at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

B. Whether Pangburn can prove a prima facie case of discrimination

In order to prove a prima facie case of disability discrimination under the Rehabilitation Act, the ADA, or the Kentucky Civil Rights Act, Pangburn must prove that she is: (1) disabled as defined by each statute; (2) "otherwise qualified" for participation in the program; and (3) being denied the benefits of or being subjected to discrimination in the program on the basis of her disability. Kaltenberger v. Ohio College of Podiatric Medicine, --- F.3d ----, No. 97-4041, 1998 WL 849746, at *3 (6th Cir. Dec. 9, 1998). Additionally, under the Rehabilitation Act, the program must receive federal funds. Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th

Cir.1988). One is "otherwise qualified" if she can meet all of the program's necessary requirements with reasonable accommodation. Kaltenberger, 1998 WL 849746 at *3.

While an educational institution must make reasonable accommodations, it is not required "to lower or to effect substantial modifications of standards to accommodate" one with a disability. Id. (internal quotation marks omitted) (quoting Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979)). "Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement." Id. Furthermore, universities are entitled to "the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." Id. (internal quotation marks omitted) (quoting Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n. 6 (1978) (Powell, J., concurring)).

In the present case, only for purposes of NKU's motion for summary judgment, the Court will assume that Pangburn is disabled; therefore, the Court must determine whether there is a genuine issue of material fact on the issue of whether Pangburn is "otherwise qualified." At the outset, the Court must consider whether Math 141 is a necessary requirement of the elementary education program at NKU. Despite Pangburn's contentions to the contrary, the Court finds completion of Math 141 with a grade of C to be a necessary requirement for obtaining an elementary education degree from NKU. The course is part of the curriculum established by NKU and approved by the Kentucky Educational Professional Standards Board. Pangburn's argument that Math 141 is an arbitrary requirement is simply without merit. The Court is both unwilling and unable to substitute its judgment for that of

NKU and the Kentucky Department of Education on this issue.

Pangburn is "otherwise qualified" if she can meet the elementary education requirements with reasonable accommodation. The accommodations that NKU offered, and Pangburn accepted, included: 1) allowing Pangburn to sit for her exams in a private room with a test proctor; 2) furnishing a test reader to Pangburn; 3) extending the time limit in which Pangburn was required to complete her exams; 4) permitting Pangburn's personal tutor to remain in the room while she took her exams; 5) providing the use of physical equipment during exams to demonstrate mathematical concepts; 6) allowing Pangburn to repeat the course more than four times; and 7) permitting Pangburn to begin student teaching without having passed Math 141. Pangburn complains that one of her proctors had difficulty reading an exam and another proctor fell asleep during another exam; however, when notified, NKU rectified these problems. Additionally, NKU offered the following accommodations that Pangburn did not accept: 1) oral testing; 2) substitution of an approved equivalent course at another university; 3) additional testing to evaluate Pangburn's math ability; and 4) a private tutorial course. Despite the foregoing accommodations extended to Pangburn by NKU, she has been unable to obtain a grade of C in Math 141.

Pangburn argues that NKU failed to accommodate her disability by refusing to accept a grade of D in Math 141, substitute another course for Math 141, or waive Math 141 altogether. Pangburn's position on this matter is untenable. Math 141 is a necessary requirement of the elementary education program and NKU is not required to fundamentally alter its program to accommodate

Pangburn's math disability.

The Court finds that there is no genuine issue of material fact on the issue of whether NKU reasonably accommodated Pangburn's math disability. Short of fundamentally altering its program, NKU appears to have provided every conceivable means of accommodating Pangburn. Therefore, because Pangburn is not "otherwise qualified," the Court finds that she has failed to state a prima facie case of discrimination under the Rehabilitation Act, the ADA, or the Kentucky Civil Rights Act.

III. CONCLUSION

Based upon the foregoing analysis, the Court, being otherwise sufficiently advised, HEREBY ORDERS that:

(1) NKU's motion for summary judgment [DE # 68] is GRANTED and judgment will be entered contemporaneously with this opinion and order in favor of the defendant;

(2) NKU's motions to disallow Pangburn's expert witnesses [DE # 37], to strike witnesses and exhibits disclosed after the discovery deadline [DE # 52], and to attach an exhibit to its reply to Pangburn's response to NKU's motion to disallow Pangburn's expert witnesses [DE # 53] are DENIED AS MOOT;

(3) Pangburn's motions to prohibit NKU from calling any expert witness [DE # 41], to prohibit NKU from using records obtained by subpoena duces tecum [DE # 42], to prohibit NKU from using an expert [DE # 46], for leave to depose counsel for NKU [DE # 65], and for summary judgment [DE # 66] are DENIED AS MOOT; and

(4) the pretrial conference and jury trial are SET ASIDE.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

[Filed March 9, 1999.]

CIVIL ACTION NO. 97-178.

DENISE PANGBURN,

Plaintiff - Appellant,

v.

NORTHERN KENTUCKY UNIVERSITY

Defendant- Appellee.

ORDER

FORESTER, J.

This matter is before the Court upon the motion of plaintiff, Denise Pangburn, to alter or amend the Court's December 30, 1998 summary judgment. Also before the Court is defendant Northern Kentucky University's ("NKU") motion to supplement its response to Pangburn's motion to alter or amend. These motions are ripe for review.

Fed.R.Civ.P. 59(e), which provides that a motion to alter or amend must be filed no later than ten days after entry of the judgment, may be used to ask the Court to reconsider its judgment and correct errors of law. United States Labor Party v. Oremus, 619 F.2d 683, 687 (7th Cir.1980). The movant bears the burden of showing that error has occurred. See Hager v. Paul Revere Life Ins. Co., 489 F.Supp. 317, 320 (E.D.Tenn.1977). Rule 59(e) is not intended to be used as a means to relitigate issues previously considered. Keweenaw Bay Indian Community v. Michigan, 152 F.R.D. 562, 563 (W.D.Mich.1992), aff'd, 11 F.3d 1341 (6th Cir.1992). "Where the movant is attempting to obtain a complete reversal of the court's judgment by offering essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal." Id. (citation omitted).

In the present case, Pangburn is attempting to relitigate issues the Court has previously considered. Furthermore, Pangburn has failed to meet her burden of showing that error has occurred. The Court, having considered Pangburn's motion, remains confident in its previous ruling. Therefore, plaintiff's motion to alter or amend the Court's December 30, 1998 summary judgment will be denied.

NKU moves the Court to supplement its response to Pangburn's motion to alter or amend. NKU states that sometime between January 27, 1999 and February 2, 1999 it became aware of the Sixth Circuit's opinion in Kaltenberger v. Ohio College of Podiatric Medicine, 162 F.3d 432 (6th Cir.1998), which is "based on facts incredibly similar to the facts in the case at bar." NKU moves the Court to grant its motion to supplement "so that the Kaltenberger decision can be considered by the Court." The

Court directs NKU's attention to the December 30, 1998 opinion and order; Kaltenberger has already been considered by the Court. Therefore, NKU's motion to supplement will be denied.

Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that Pangburn's motion to alter or amend the Court's December 30, 1998 summary judgment [DE # 74] and NKU's motion to supplement its response thereto [DE # 77] are DENIED.

APPENDIX C

NOT FOR PUBLICATION

NO. 99-5474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed March 23, 2000]

DENISE PANGBURN,

Plaintiff - Appellant,

v.

NORTHERN KENTUCKY UNIVERSITY

Defendant- Appellee.

_____/

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT

Before MARTIN, Chief Judge; SUHRHEINRICH, Circuit Judge; and GWIN, District Judge.*

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

PER CURIAM. Plaintiff-Appellant Denise Pangburn

("Pangburn") appeals from the district court's grant of summary judgment for Defendant-Appellee Northern Kentucky University ("NKU") on her disability discrimination claims brought pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131; and the Kentucky Civil Rights Act ("KCRA"), Ky.Rev.Stat. Ann. § 344.020. We affirm for the reasons stated in the district court's opinion.

I.

Pangburn was enrolled at NKU as an elementary education major. She planned to teach Kindergarten through Fourth grades. In order to obtain an education degree, NKU requires a "C" or higher in both "Mathematics for Elementary and Middle-Grades Teachers" ("Math 140"), and "Mathematics for Elementary and Middle-Grades Teachers II" ("Math 141"). Pangburn obtained a "C" in Math 140 on her second attempt, but failed to obtain higher than a "D" in Math 141 after completing that course six times.

Pangburn was diagnosed with a math learning disability after her first four unsuccessful attempts to complete Math 141. Subsequently, Pangburn was offered several accommodations that are the subject of this suit. Despite these accommodations, Pangburn failed to complete Math 141 successfully during her next two attempts. Consequently, she failed to receive her elementary education degree.

Pangburn filed this suit against NKU on October 20, 1997, alleging that NKU discriminated against her on the basis of her math learning disability. The parties filed motions for summary judgment on November 25, 1998. The district

court granted summary judgment for NKU on December 30, 1998. Pangburn then filed a motion to alter, modify, and vacate the court's summary judgment order, which the district court denied. Pangburn timely appeals.

This Court reviews a district court's grant of summary judgment de novo. See Doren v. Battle Creek Health Sys., 187 F.3d 595, 597 (6th Cir.1999). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U .S. 317, 322 (1986). A "genuine issue of material fact" is one that, if proven at trial, would result in a reasonable jury finding for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The evidence and inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II.

Our Circuit has recognized that the analysis of an ADA claim "roughly parallels" that of Rehabilitation Act claims. See McPherson v. Michigan High School Athletic Ass'n, 119 F.3d 453, 459-60 (1997) (en banc) (quoting Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir.1996)). The "principal distinction between the two statutes is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance." Id. at 460.

In order to state a prima facie case of disability discrimination under the Rehabilitation Act, the ADA, or the KCRA, Pangburn must prove that she is (1) disabled as defined by each statute, (2) "otherwise qualified" for

participation in the program, and (3) being denied the benefits of or being dismissed from the program based on her disability. See Kaltenberger v. Ohio College of Podiatric Med., 162 F.3d 432, 435 (6th Cir.1998) (ADA, Rehabilitation Act, and Ohio Civil Rights Act claims); Brohm v. JH Properties, Inc., 149 F.3d 517, 520 (6th Cir.1998) (employment discrimination case noting that the KCRA mirrors the ADA and Rehabilitation Act). A disabled person is "otherwise qualified" if she can meet the program's necessary requirements with reasonable accommodation. See Kaltenberger, 162 F.3d at 435.

Both the parties and the district court assumed for the purpose of summary judgment that Pangburn is disabled under the ADA, Rehabilitation Act, and the KCRA. The issue on appeal is whether Pangburn was provided reasonable accommodations that would make her "otherwise qualified" under those statutes.

Educational institutions are not required "to lower or to effect substantial modifications of standards to accommodate" the disabled. See Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979). Moreover, our Circuit has repeatedly recognized the need to defer to academic institutions when evaluating school curricula or other academic decisions in disability discrimination cases. See Kaltenberger, 162 F.3d at 436; Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir.1988).

Pangburn argues that Math 141 is not a necessary requirement to teach in Kentucky and that it should be waived or that NKU should accept her grade of "D" in that class to satisfy that requirement. She also argues that NKU failed to reasonably accommodate her math learning disability by noting several deficiencies in the accommodations provided

by NKU, which she contends creates a genuine issue of material fact.

The district court found that Math 141 is a necessary requirement of NKU's elementary education program because Math 141 is part of the education curriculum established by NKU and approved by the Kentucky Educational Professional Standards Board. This finding was made in light of the courts' deference to educational institutions and the Kentucky Department of Education on such issues. Thus, the district court held that NKU did not have to accept a grade of "D" for Math 141 or waive the course altogether because it was a necessary requirement of NKU's education program.

The district court then found that NKU reasonably accommodated Pangburn's disability because it offered several recommended accommodations to help her complete Math 141 successfully. NKU offered and Pangburn accepted seven accommodations, including: (1) a private room for exam testing, (2) a test proctor to read the exams to Pangburn, (3) extended time to complete her exams, (4) use of a personal tutor who was permitted to remain in the room while Pangburn took her exams, (5) use of manipulatives and other physical equipment during exams to demonstrate mathematical concepts, (6) allowing Pangburn to repeat Math 141 more than four times, and (7) permission to begin student teaching despite her failure to pass Math 141 successfully.

Additionally, NKU offered the following accommodations that Pangburn did not accept: (1) oral exam testing, (2) substitution of an approved equivalent course at another university, (3) additional testing to evaluate Pangburn's math ability, and (4) a private tutorial course. Despite these accommodations, Pangburn failed to obtain a grade of "C" or better in Math 141. The district court

concluded that there was no genuine issue of material fact concerning whether NKU reasonably accommodated Pangburn's learning disability. Having reviewed the record, the parties' briefs, and after hearing oral argument, we agree.

III.

Accordingly, we affirm the district court's grant of summary judgment for the reasons stated in its opinion.

APPENDIX D

Case No: 99-5474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 11, 2000]

DENISE PANGBURN,

Plaintiff - Appellant,

v.

NORTHERN KENTUCKY UNIVERSITY

Defendant- Appellee.

_____/

ORDER

BEFORE: MARTIN, Chief Judge; SUHRHEINRICH, Circuit Judge; and GWIN, District Judge.*

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

Upon consideration of the petition for rehearing filed by the appellant Denise Pangburn,

It is **ORDERED** that the petition for rehearing be,

and it is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX E

Auxiliary Aids And Services For Postsecondary Students With Disabilities: Higher Education's Obligations Under Section 504 And The ADA

U.S. Department of Education
Office for Civil Rights
Washington, D.C.
Revised October 1996

Section 504 of the Rehabilitation Act of 1973

In 1973, Congress passed Section 504 of the Rehabilitation Act of 1973 (Section 504), a law that prohibits discrimination on the basis of physical or mental disability (29 U.S.C. Section 794). It states:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . ."

The Office for Civil Rights in the U.S. Department of Education (Department) enforces regulations implementing Section 504 with respect to programs and activities that receive funding from the Department (34 C.F.R. Part 104 [1988]). The Section 504 regulation applies to all recipients of this funding, including colleges, universities, and postsecondary vocational education and adult education programs. Failure by these recipients to provide auxiliary

aids to students with disabilities that results in a denial of a program benefit is discriminatory and is prohibited by Section 504.

Title II of the Americans with Disabilities Act of 1990, (ADA) 42 U.S.C. . 12131 et seq., prohibits state and local governments from discriminating on the basis of disability. The Department enforces Title II in public colleges, universities, and graduate and professional schools. The requirements regarding the provision of auxiliary aids and services in higher education institutions described in the Section 504 regulation are generally incorporated in the general non-discrimination provisions of the Title II regulation (see 28 C.F.R. Part 35).

Postsecondary School Provision of Auxiliary Aids

Subpart E of the Section 504 regulation contains the following requirement relating to a postsecondary recipient's obligation to provide auxiliary aids to qualified students who have disabilities:

> A recipient . . . shall take such steps as are necessary to ensure that no disabled student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

34 C.F.R. 104.44 (d)(1). Section 35.160 (b)(1) of the Title II regulation
states:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

It is, therefore, the institution's responsibility to provide these auxiliary aids and services in a timely manner to ensure effective participation by students with disabilities. If students are being evaluated to determine their eligibility under Section 504 or the ADA, the recipient must provide auxiliary aids in the interim.

Postsecondary Student Responsibilities

A postsecondary student with a disability who is in need of auxiliary aids is obligated to provide notification of the nature of the disabling condition to the institution and to assist the institution in identifying appropriate and effective auxiliary aids. In elementary and secondary schools, teachers and school specialists may have arranged support services for students with disabilities. However, in postsecondary institutions, the students themselves must identify the need for an auxiliary aid and give adequate notice of the need. The student's notification should be provided to the appropriate representative of the institution who, depending upon the nature and scope of the request, could be one or more of the following: the institution's Section 504 or ADA coordinator, the appropriate dean, a faculty advisor, or professor. Unlike elementary or secondary recipients, postsecondary recipients, in response to a request for auxiliary aids, may make reasonable requests that the student provide supporting diagnostic test results and

professional
prescriptions for auxiliary aids. An institution also, on its own, may obtain a professional determination of whether requested auxiliary aids are necessary and, if so, what kind.

Examples of Auxiliary Aids

Some of the various types of auxiliary aids and services may include:

- taped text
- note takers
- interpreters
- readers
- videotext displays
- television enlargers
- talking calculators
- electronic readers
- Braille calculators, printers, or typewriters
- telephone handset amplifiers
- closed caption decoders
- open and closed captioning
- voice synthesizers
- assistance in filling out forms
- specialized gym equipment
- calculators or keyboards with large buttons
- reaching device for library use
- raised-line drawing kits
- assistive listening devices
- assistive listening systems
- telecommunication devices for deaf persons

Technological advances in electronics have vastly improved participation by students with disabilities in educational activities. Institutions are not required to provide the most sophisticated auxiliary aids available; however, the aids provided must effectively meet the needs of a student with a disability. An institution has flexibility in choosing the specific aid or service it provides to the student, as long as the aid or service selected is effective. These aids should be selected after consultation with the student who will use them.

Effectiveness of Auxiliary Aids

No aid or service will be useful unless it is successful in equalizing the opportunity for a particular student with a disability to participate in the educational program or activity. Not all students with a similar disability benefit equally from an identical auxiliary aid or service. The regulations refers to this complex issue of effectiveness in several sections. The specific reference to the effectiveness of auxiliary aids in the Section 504 regulation states:

> Auxiliary aids may include taped texts, interpreters or other effective methods of making orally-delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions.

34 C.F.R. 104.44 (d)(2). There are other references to effectiveness in the general provisions of the Section 504 regulation which state, in part, that a recipient may not:

> Provide a qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others; or Provide different or separate aids, benefits, or services to disabled persons or to any class of disabled persons unless such action is necessary to provide qualified persons who are disabled with aids, benefits, or services that are as effective as those provided to others.

34 C.F.R. 104.4 (b)(iii) and (iv). For comparable provisions in the Title II regulation, see 28 C.F.R. .. 35.130 ((b)(1)(iii) and (iv). The Section 504 regulation also states:

> [A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for disabled and nondisabled persons, but must afford disabled persons equal opportunity to obtain the same result, to gain the same benefit or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

34 C.F.R. 104.4 (b)(2). The institution must analyze the appropriateness of an aid or service in its specific context. For example, the type of assistance needed in a classroom by a student who is hearing-impaired may vary, depending upon whether the format is a large lecture hall or a seminar. With the one-way communication of a lecture, providing the service of a note taker may be adequate; but in the two-way communication of a seminar, an interpreter may be needed. Public institution also should be aware that under Title II of the ADA, in determining what type of auxiliary aid and service is necessary, the institution must give primary consideration to the requests of individuals with disabilities.

Cost of Auxiliary Aids

Covered institutions are responsible for the provision of effective auxiliary aids to students who are disabled. If an aid is necessary for classroom or other appropriate (non-personal) use, the institution must make it available, unless provision of the aid causes undue burden. A student with a disability may not be required to pay part or all of the costs of that aid or service. An institution may not place a limit on its expenditure for auxiliary aids or services or refuse to provide auxiliary aids because it believes that other providers of these services exist, or

condition its obligation to provide auxiliary aids on the availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

Personal Aids and Services

An issue which is often misunderstood by institutions and students is the provision of personal aids and services to postsecondary students. Personal aids and services, including help in bathing, dressing, or other personal care, are not required to be provided by postsecondary institutions. The Section 504 regulation states:

> Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

34 C.F.R. 104.44 (d((2). Title II of the ADA similarly states that personal services are not required.

In order to ensure that students with disabilities are given a free appropriate public education, local education agencies are required to provide many services and aids of a personal nature to students with disabilities when they are enrolled in elementary and secondary schools. However, once students with disabilities graduate from a high school program or its equivalent, educational institutions are no longer required to provide aids, devices, or services of a personal nature. A covered postsecondary institution may

not deny a service to a student with a disability if that service is offered to nondisabled students. Students with disabilities must be given equal access to regular medical treatment and health services offered by the institution. For example, if
a college's health care unit offers a cholesterol test, a student with a disability who requests this service must have it provided.

The provision of personal services relating to certain individual academic activities is not required of postsecondary institutions. Personal attendants and individually prescribed devices are the responsibility of the student who has a disability and not of the institution. For example, readers may be provided for classroom use but institutions are not required to provide readers for personal use or for help during individual study time.

Questions Commonly Asked by Colleges and Universities and Students

Q: What are a college's obligations to provide auxiliary aids for library study?

A: Libraries and some of their significant and basic materials must be made accessible by the recipient to students with disabilities. Students with disabilities must have the appropriate auxiliary aids needed to locate and obtain library resources. A postsecondary school must ensure that its library's basic index of holdings (whether formatted on-lineor on index cards) is accessible. For example a screen and keyboard (or card file) must be placed within reach of a student using a wheelchair. If a Braille index of holdings is not

available for blind students, readers must be provided for necessary assistance.

Articles and materials which are library holdings and are required for course work must be accessible to all students enrolled in that course. This means that if the material is required course work, then the text must be read for a blind student, or provided in Braille or on tape. A student's actual study time and use of these articles are considered personal study time and the institution has no further obligation to provide additional auxiliary aids.

Q: What if an instructor objects to the use of an auxiliary or personal aid?

A: Sometimes postsecondary instructors may not be familiar with Section 504 or ADA requirements regarding the use of an auxiliary or personal aid in their classrooms. Most often, questions arise when a student uses a tape recorder. College teachers may believe recording lectures is an infringement upon their own or other students' academic freedom, or constitutes copyright violation.

The instructor may not forbid a student's use of an aid if that prohibition limits the student's participation in the school program. The Section 504 regulation states:

> A recipient may not impose upon students with dis-abilities other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings that have the effect of limiting the participation

of disabled students in the recipient's education program or activity.

34 C.F.R. 104.44 (b). In order to both allow a student with a disability to use an effective aid and protect the instructor, the institution may require the student to sign an agreement so as not to infringe on a potential copyright or to limit freedom of speech.

Q: What if students with disabilities require auxiliary aids during an examination?

A: A student may need an auxiliary aid or service in order to successfully complete a course exam. This may mean that a student be allowed to give oral rather than written answers. It also may be possible for a student to present a tape containing the oral examination response. A test should ultimately measure a student's achievements and not the extent of the disability.

Q: Can postsecondary institutions treat a foreign student with disabilities who needs auxiliary aids differently than American students?

A: No, an institution may not treat a foreign student who needs auxiliary aids differently than an American student. A postsecondary institution must provide to a foreign student with a disability the same type of auxiliary aids and services it would provide to an American student with a disability. Section 504 and the ADA require that the provision of services be based on a student's disability and not on other criteria, such as nationality.

Q: Are institutions responsible for providing auxiliary services to disabled students in filling out financial aid and student employment applications, or other forms of necessary paperwork?

A: Yes, an institution must provide services to disabled students who may need assistance in filling out aid applications or other forms. If the student requesting assistance is still in the process of being evaluated to determine eligibility for an auxiliary aid or service, help with this paperwork by the institution is mandated in the interim.

Q: Does a postsecondary institution have to provide auxiliary aids and services for a non-degree student?

A: Yes, students with disabilities who are auditing classes or who otherwise are not working for a degree must be provided auxiliary aids and services to the same extent as students who are in a degree-granting Program.

For More Information

For more information on Section 504 and the ADA and their application to auxiliary aids and services for disabled students in postsecondary schools, please contact the Civil Rights Office that serves your area.

To obtain additional assistance, see OCR's list of its 12 offices, which contains the address and telephone number for the OCR office that services your area.
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APPENDIX F

Table 1
Percentage of Full-Time College Freshmen Reporting Disabilities: Selected Years

Disability	1988	1991	1994	1996	1998
Speech	0.3%	0.5%	0.3%	0.3%	0.5%
[redacted]					
Learning Disability	1.2%	2.2%	3.0%	3.1%	3.5%
[redacted]					
Partially sighted or blind	1.9%	2.2%	2.0%	2.0%	1.1%
[redacted]					
Other	1.4%	1.6%	1.7%	1.8%	1.9%
Total	**7.0%**	**8.8%**	**9.2%**	**9.2%**	**9.4%**

*Hearing data were not collected in 1998. The 1998 figure reflects 1996 data.

Note: Figures in columns do not necessarily equal the totals at the bottom, because individuals were allowed to identify more than one disability.

Source: HEATH Resource Center, American Council on Education, Based on unpublished data from the Cooperative Institutional Research Program, UCLA, selected years. http://www.acenet.edu/About/programs/Access&Equity/HEATH/CollegeFresh.html